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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BARBARA A. DE BUONO, NEW YORK STATE COMMISSIONER OF HEALTH, *et al.*,
Petitioners,
v.
NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, ETC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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This brief *amicus curiae* of the American Federation of State County and Municipal Employees, AFL-CIO ("AFSCME") is filed with the written consent of the parties, as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

AFSCME is a nationwide labor organization with a current membership of approximately 1.3 million public employees. Several thousand AFSCME members are employed by public hospitals in the State of New York and thus are affected by, and have an interest in, the issue of

whether a gross receipts tax on all hospitals operating within the State of New York is preempted by ERISA to the extent that the tax applies to the income of a private hospital owned and operated by an ERISA plan.

AFSCME's brief is joined by two AFSCME affiliates: New York City District Council 37 AFSCME, AFL-CIO ("District Council 37"); and State of New York, Civil Service Employees' Association, Local 1000, AFSCME, AFL-CIO ("CSEA"). District Council 37 represents New York City hospital employees, and CSEA represents New York State hospital employees.

SUMMARY OF ARGUMENT

In the real world of affairs ERISA welfare benefit plans engage in a variety of commonplace economic activities, consummate a variety of commonplace economic transactions, and forge a variety of commonplace economic relationships—all in the same form and in the same manner as non-ERISA plan entities. This range of activities, transactions and relationships has historically been, and currently is, subject to a myriad of state tax laws and regulatory laws that operate in areas of local concern not regulated by ERISA itself, and that apply without regard to the ERISA plan status of one of the involved parties.

It is our submission that this Court's prior decisions in *New York Conference of Blue Cross v. Travelers Ins.*, 115 S.Ct. 1671 (1995) and *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), establish the rule that ERISA § 514(a) does *not* preempt such state police power laws that (1) go to the economic activities, transactions, and relationships of both ERISA plans and non-ERISA plan entities that are not regulated by ERISA itself; and (2) do not in terms, or in practical effect, as a matter of economics or otherwise, mandate ERISA plan "employee benefit structures or their administration," or

provide "alternate enforcement mechanisms" to those provided by ERISA, *Travelers*, 115 S.Ct. at 1678. *See infra* pp. 3-13.

That non-preemption rule fully disposes of respondents' ERISA preemption challenge to New York's 0.6% gross receipts tax on all hospitals operating within the State. Simply stated, respondents cannot and do not contend that this generally-applicable state tax operates in an area regulated by ERISA itself, mandates changes in ERISA plan "benefit structures or their administration" or provides "alternate enforcement mechanisms" to those provided by ERISA.

And, neither of the grounds that respondents do rely upon for avoiding the application of that non-preemption rule to New York's gross receipts tax on hospitals—(1) that the tax detrimentally affects the "mission and purpose" of respondents' plan; and (2) affects the plan "directly" rather than "indirectly"—can withstand analysis. As we show, neither provides a principled basis for distinguishing the State laws upheld against ERISA preemption challenges in *Travelers* and *Mackey*. *See infra* pp. 13-22.

ARGUMENT

I.

A. The Employee Retirement Income and Security Act defines an "employee welfare benefit plan" to include "any plan, fund or program . . . for the purpose of providing for its participants or their beneficiaries . . . [*inter alia*] medical, surgical or hospital care or benefits . . . ." ERISA § 3(1)(B), 29 U.S.C. § 1002(1)(B). And, with respect to such plans, ERISA regulates the reporting and disclosure of plan benefits and the fiduciary responsibilities of those who manage and control the plan.

ERISA, then, covers the establishment of a legal structure (1) for defining a set of medical, surgical or hospital

care benefits and a set of beneficiaries; and (2) for capitalizing, and for then defraying, the cost of providing those benefits; but ERISA does *not* cover the actual provision of the medical, surgical or hospital care to the beneficiaries. *See Fort Halifax v. Coyne*, 482 U.S. 1, 7-19 (1987) (distinguishing ERISA "welfare benefit plans" and ERISA "benefits"). ERISA provides, too, that "the provisions of this subchapter shall supersede . . . State laws insofar as they may . . . relate to any employee benefit plan . . ." ERISA § 514(a), 29 U.S.C. § 1144(a).

Respondents in this case maintain that an employee welfare benefit plan that chooses to provide medical, surgical or hospital care services through plan owned and operated facilities rather than to provide monetary benefits that defray the cost of the services of third-party health care providers are shielded by ERISA from State tax (and regulatory) laws that otherwise govern health care providers and facilities.

The meaning of the phrase "relate to" in ERISA's preemption provision has proved elusive, and that is to put the difficulty of this ongoing inquiry in the mildest of terms. Even with the benefit of twenty years of litigating elucidation we make no pretense of having reached the point of being able to provide to the Court for its consideration a template that guides § 514(a) decisionmaking. But we do submit that there is at least one discrete *non*-preemption rule that can now be stated with confidence and that this rule governs this case.

In the real world of affairs ERISA welfare benefit plans engage in a variety of commonplace economic activities, consummate a variety of commonplace economic transactions, and forge a variety of commonplace economic relationships—all in the same form and in the same manner as non-ERISA plan entities. Plans hire and employ personnel and purchase and rent office, and other, properties. Plans also purchase all manner of goods for the

plan's use and a variety of services—including hospital care—from third parties on the market for and on behalf of the plan or its beneficiaries. And, as here, plans provide services to beneficiaries—including hospital care—through plan owned and operated facilities.

This range of activities, transactions and relationships has historically been, and currently is, subject to a myriad of State tax laws and regulatory laws raising revenue, addressing market imperfections or safeguarding the public health and safety that apply without regard to the ERISA plan status of one of the involved parties. These laws govern, *inter alia*, the hiring and retention of employees, the buying and selling of services and goods, the standards for operating hospital facilities, etc. Such State laws—which in this country form the core of the legal structure within which the provision of services and goods take place supplemented by narrow bands of interstitial federal legislation—are paradigm examples of the States' historic police power. And, such laws address concerns far outside the realm of concerns addressed by ERISA.

All this being so, it is our submission that ERISA does *not* preempt such State police power laws that (1) go to economic activities, transactions and relationships of both ERISA plans and non-ERISA plan entities that are not regulated in ERISA itself; and (2) do not in terms, or in practical effect, as a matter of economics or otherwise, mandate ERISA plan "employee benefit structures or their administration" or provide "alternate enforcement mechanisms" to those provided by ERISA, *New York Conference of Blue Cross v. Travelers Inc.*, 115 S.Ct. 1671, 1677 (1995).

On that submission, as we show, the New York statute here imposing a 0.6% gross receipts tax on all private hospitals operating within the State—including hospitals owned and operated by an ERISA plan and those owned and operated by non-ERISA plan entities—is *not* preempted by ERISA in any respect.

Because this case is related so closely to *Travelers*—and because our submission as to the governing rule is drawn largely from *Travelers* and what we believe are its fair implications—we begin by outlining *Travelers*' rationale. With *Travelers*' lessons in mind we then consider the variation on the *Travelers*' theme presented in this case.

B. (1) *Travelers* concerned "[a] New York statute requir[ing] hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan, and . . . subject[ing] certain health maintenance organizations (HMOs) to surcharges that vary with the number of Medicaid recipients each enrolls." 115 S.Ct. at 1673. The Court—after canvassing the general principles on preemption and its ERISA § 514(a) jurisprudence to that juncture—stated:

> We hold that the provisions for surcharges do not "relate to" employee benefit plans within the meaning of ERISA's pre-emption provision, § 514(a), 29 U.S.C. § 1144(a), and accordingly suffer no pre-emption. [115 S.Ct. at 1674.]

(2) The proper starting points for analysis, said the *Travelers* Court, are these: *First*,

> in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [115 S.Ct. at 1676 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (citation omitted).]

Second, "uncritical literalism is no . . . help" in construing § 514(a)'s "clearly expansive" language because "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, uni-

versally, relations stop nowhere'." 115 S.Ct. at 1677 (quoting H. James, Roderick Hudson xli (New York ed., World's Classics 1980)). "But that, of course, would be to read Congress's words of limitations as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Id.*

Third, the Court's "prior attempt [in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983)] to construe the phrase 'relate to' does not give us much help drawing the line here." 115 S. Ct. at 1677. Thus,

> [w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive. [*Id.*]

And, *fourth*,

> [w]e have found that in passing § 514(a), Congress intended
>
> > "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Ingersoll-Rand* [*v. McClendon*], 498 U.S. [133], 142 [1990].
>
> * * * *
>
> [That being so the Court has held] ERISA pre-empted[,] state laws that mandated employee benefit structures or their administration. Elsewhere, we have held that state laws providing alternate enforce-

ment mechanisms also relate to ERISA plans, triggering pre-emption. [115 S.Ct. at 1677-78.][1]

(3) Against that background, the *Travelers* Court turned to the New York hospital surcharge law there at issue—a law whose "purpose and effect," the Court concluded, "distinguish[ed]" it from the State laws that had been held ERISA preempted. 115 S. Ct. at 1678.

The distinctions the Court emphasized are, first, that hospital charge differentials by type of insurer and by region have always existed in regimes in which there is no State regulation of such charges as well as those regimes in which there is such regulation; and, second, that such charge differentials "do[] not bind plan administrators to any particular choice" and in that sense do not "function as a regulation of an ERISA plan itself." 115 S.Ct. at 1679. Given the "common character of [such] rate differentials even in the absence of state action," said the *Travelers* Court, "it is unlikely that ERISA pre-emption was meant to bar [state laws that generate] such indirect economic influences" on ERISA plan decisionmaking. *Id.*

Then, of particular pertinence here, the *Travelers* Court added:

> [T]he existence of other common state action with indirect economic effects on a plan's costs leaves the intent to pre-empt even less likely. Quality standards, for example, set by the State in one subject area of hospital services but not another would affect the relative cost of providing those services over others and, so, of providing different packages of health insurance benefits. Even basic regulation of employment conditions will invariably affect the cost and price of services. . . . [S]uch state regulation will indirectly affect what an ERISA or other plan can afford or get for its money. [115 S.Ct. at 1679.]

[1] In addition to *Shaw* and *Ingersoll-Rand*, the Court listed *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) as falling within this class of cases finding ERISA preemption. The State laws at issue in *Alessi*, *Shaw* and *FMC Corp.* dictated the structure of ERISA benefit plans; in *Ingersoll-Rand*, the State law concerned the protection and enforcement of an express ERISA right.

And, the Court drew the following lesson from its reasoning:

> [I]n the absence of a more exact guide to intended preemption than § 514, it is fair to conclude that mandates for rate differentials would not be preempted unless other regulation with indirect effects on plan costs would be superseded as well. The bigger the package of regulation with indirect effects that would fall on the respondent's reading of § 514, the less likely it is that federal regulation of benefit plans was intended to eliminate state regulation of health care costs.
>
> Indeed, to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase insurance policies or HMO memberships that would cover such services, would effectively read the limiting language in § 514(a) out of the statute. . . . [*N*]*othing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern.* . . . . [115 S.Ct. at 1679-80]

Consistent with the above-described rationale, the *Travelers* Court tempered its holding in only one regard:

> We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be pre-empted under § 514. [115 S.Ct. at 1683.]

(4) The *Travelers* Court also stated that its holding is "confirmed by our decision in *Mackey v. Lanier Collection*

Agency & Service, Inc., 486 U.S. 825 (1988), which held that ERISA preemption falls short of barring application of a general state garnishment statute to participants' benefits in the hands of an ERISA welfare benefit pl[illegible]." 115 S.Ct. at 1680. *Travelers* explains that in *Mackey*

> [w]e took no issue with the argument of the *Mackey* plan's trustees that garnishment would impose administrative costs and burdens upon benefit plans, *id.*, at 831, but concluded from the text and structure of ERISA's pre-emption and enforcement provisions that "Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits." *Id.*, at 831-832. [115 S.Ct. at 1680.]

And, as the *Mackey* Court itself had made clear, garnishment actions against ERISA plans stand on no different footing in this regard than the wide array of state law claims that might be brought against ERISA plans and non-ERISA plans alike:

> [L]awsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan . . . are relatively commonplace. Petitioners and the United States (appearing here as *amicus curiae*) concede that these suits, although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA § 514(a). [486 U.S. at 833.]

C. The basic point of the ERISA preemption provision, then, is "to ensure that [ERISA] plans and plan sponsors would be subject to a uniform body of *benefits* law." *Ingersoll-Rand*, 498 U.S. at 142 (emphasis added). That entails the conclusion that State laws that "mandate employee benefit structures or their administration" by, for example, "imposing substantive coverage requirements

binding plan administrators," as well as State laws that "provide alternate enforcement mechanisms" for an ERISA norm, *do* "relate to" ERISA plans within the meaning of § 514(a). *See Travelers*, 115 S.Ct. at 1677-78 (discussing the overall preemption rule) and *id.* at 1680-81 (discussing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)). Those conclusions fill in the central features of § 514(a)'s "clearly expansive" area of preemption.

At the same time, Congress, the Court has concluded, did not press this uniformity interest to the point where it works wholesale repeal of State police power laws that apply both to ERISA plan transactions, activities and relationships and to non-ERISA plans entity transactions, activities and relationships of the same kind.

Rather, where such state laws apply to entities with which ERISA plans have economic relations—such as hospitals that provide ERISA plan beneficiaries hospital care at the plan's expense—and apply on the same terms whether the hospital is caring for an ERISA plan beneficiary or a non-ERISA plan beneficiary, ordinarily the law is *not* preempted by reason of its effects on the plan or on plan costs.

Congress, in other words, did *not* contemplate that ERISA plans are entitled to the uniform police power regulation of the third-person providers of the services—*e.g.*, hospital care—the plan is, in the final analysis, established to provide. Indeed, given the fact that ERISA does not, for example, regulate hospital accreditation, any aspect of hospital staffing or operations, or the costing and pricing of hospital services, and the further fact that the laws regulating such matters have a large and certain effect on ERISA plans established to finance the provision of hospital care, any other conclusion, as the *Travelers* Court emphasized, would create a huge—and unprecedented—legal no-man's land in a critical area of traditional State concern.

Travelers involved a State law regulating certain charges by third-person hospitals to insurers and HMOs that passed those changes on to ERISA plans and to others. And, *Travelers'* holding is calibrated to ERISA § 514(a)'s effect on State laws having such an indirect economic impact on ERISA plans and on their decisions as to what benefits to provide and how to provide those benefits. But *Travelers' ratio decidendi*, we believe, rests on a far more fundamental point of far greater consequence.

Travelers holds the New York hospital surcharge law there *not* preempted *not* because of its unique characteristics and *not* because the State regulated hospitals were third-person providers to ERISA plans (rather than ERISA plans or entities owned by ERISA plans) but on the following general principle: the New York surcharge law is part and parcel of the State's general regulation of health care, the law has only a consequential—and in that sense "indirect"—economic impact on ERISA plan "employee benefit structures and their administration" *and* "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." 115 S.Ct. at 1680.

Given *Travelers'* rationale, it follows that State police power laws are not preempted merely because the law imposes "administrative costs and burdens upon benefit plans" on the same, non-discriminatory basis as the law imposes such costs and burdens on non-ERISA plan entities. *Mackey*—and *Travelers'* elaboration of *Mackey*—stand for just this unsurprising proposition. For nothing in reason, and nothing in ERISA, suggests—much less compels—the conclusion that an ERISA plan's decision to implement its benefit program, in whole or in any part, through its own service facility is to generate a different line of demarcation between the area of federal legal uniformity and the area of State legal diversity, than the decision to implement a benefit program by using the plan's corpus to pay a third person to provide the same service to the plan or to plan beneficiaries. The contrary conclu-

sion exalts organizational form—and the plan decision whether to "insource" or "outsource"—above legal substance. That could not be plainer here where the ERISA plan hospitals exempted by the court below from the New York gross receipts tax are "incorporated separately as New York not-for-profit corporations and are licensed by the New York State Department of Health as disagnostic and treatment centers." Petition for a Writ of Certiorari, 4.

Indeed, to suppose that Congress intended in enacting ERISA to preclude the States from requiring ERISA plans that choose to engage in activities traditionally taxed and regulated by the States to pay the same taxes and comply with the same police power regulations that all other entities involved in that same activity must pay and comply with is to suppose that Congress created an ERISA-centric world—a world in which all ERISA plans operate in an hermatically-sealed environment insulated from all State influence. It is to suppose, in other words, that Congress intended to place ERISA plans above all the civil laws of the States in which the plan operates by *exempting* the plan from the State's laws.

It is very much to the point that so far as we are aware, there is no context in which Congress has ever expressed the intent to take such an extraordinary step with respect to any private entity. It is even more to the point that precisely because this is so—and precisely because of the presumption against the preemption of the States' historic police power—that *Travelers* and *Mackey* squarely reject the proposition that Congress took such a step with respect to ERISA plans in ERISA § 514(a).

II.

With *Travelers* and its lessons in mind, we now turn to consider the status of the specific state statute at issue in this case—New York's 0.6% gross receipts tax on all hospitals operating within the State—under ERISA § 514(a).

A. It facilitates analysis of the New York tax to begin with a situation that is at one remove from the situation here and that we submit is governed by *Travelers* in terms. The great majority of ERISA welfare benefit plans purchase hospital care for their beneficiaries from third-party hospitals and do not provide that care to their beneficiaries through hospitals that the ERISA plan itself owns and operates. Such ERISA plans are burdened by New York's gross receipts tax on hospitals in precisely the same limited manner as ERISA plans were burdened by the surcharge law upheld in *Travelers*: in both settings, the plans experience an increase in the cost of providing health benefits to their beneficiaries over that cost if the State had not pased the tax law or the surcharge law (or taken other legislative/administrative action that increases the costs the hospital builds into its charges or that sets hospital charges).

Travelers' holding that the New York surcharge law is *not* ERISA preempted therefore compels the conclusion that the gross receipts tax is *not* preempted insofar as it applies to ERISA welfare benefit plans that purchase hospital services for their beneficiaries from third-person hospital care providers.

B. Thus, the narrow open question presented by this case is whether there is a different preemption result with respect to those ERISA plans that have made the decision to provide hospital care to their beneficiaries through medical centers that the plans themselves own and operate. The court below answered this question in the affirmative, and respondents seek the same answer from this Court both on the ground relied upon by the court below and on an independent ground as well. In the two subsections that follow, we address both grounds of decision urged by respondents, and demonstrates that both are wanting.

(1) In the court below, the State argued that under *Travelers* and *Mackey* a State may collect a variety of taxes of general application—including payroll taxes, sales

taxes, utility taxes and gasoline taxes—from ERISA plans that choose to own and operate hospitals within the State and that the 0.6% gross receipts tax on hospitals is no different in kind from those state taxes. *See* Appendix To Petition For A Writ Of Certiorari ("Pet. App.") 11a. Without questioning the State's premise that these various other State taxes of general application would under the reasoning of *Travelers* and *Mackey* survive a preemption challenge by ERISA plans that own and operate hospitals within the State, the court below found that the State's gross receipts tax on hospitals "is distinguishable from these laws of general application." *Id.* at 12a.

In its initial opinion, the court below stated this distinction as follows:

> The HFA does not apply broadly to every sector of society in New York; nor does it apply to the Fund simply because it engaged in certain kinds of activities which any other member of society might engage in. . . . Rather, the HFA targets only the health care industry . . . by definition, the realm where ERISA welfare plans must operate. . . . In a case such as the present one where the plan has chosen to provide medical benefits through self-run medical centers, the HFA operates as an immediate tax on payments and contributions which were intended to pay for participants' medical benefits. The HFA thus directly affects the Fund in its principal role as an employee welfare benefit plan. It does not touch the Fund only slightly on the outer limits of its plan activities. It affects the very operations and functions that make the Fund what it is, a provider of medical, surgical, and hospital care to its participants and their beneficiaries.
>
> We thus conclude that the HFA "relates to" the Fund and does so in a very direct way. The tax depletes those assets earmarked for the provision of health care benefits and, as a result, will cause the Fund to reduce benefits provided and/or to charge beneficiaries more in the future for the benefits re-

> ceived. Both impacts will detrimentally affect the central mission and purpose of the Fund . . . . [Pet. App. 12a.]

And, in its post-*Travelers* opinion, the court below reiterated that the gross receipts tax

> depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan. As we observed in our original opinion, the HFA imposes "an immediate tax on payments and contributions which were intended to pay for participants' medical benefits . . . [and] thus directly affects the Fund in its principal role as an employee welfare benefit plan." [Pet. App. 3a-4a.]

In its Brief in Opposition, respondents invoked the foregoing as the short and definitive answer to "the wolf cry repeated in the petition to this Court," that a finding of preemption in this case would shield ERISA plans from the numerous other state taxes and regulations of general application that result in increases in the cost of providing health care benefits. *See* Respondents' Brief in Opposition at 17. As respondents see it, the court below was correct in recognizing that these various State taxes and regulations are of a substantially different nature than a gross receipts tax on hospitals because the latter—and only the latter—will "sap the lifeblood" of ERISA plans and "directly hinder their essential functions." *Id.* at 18.

With all respect to the court below, and to respondents, that reasoning cannot bear a moment's scrutiny. Where, as here, an ERISA plan has chosen to own and operate a hospital in lieu of purchasing hospital care from third-party providers, the plan, to accomplish its "mission and purpose" as the plan has defined it, *see* Pet. App. 12a, must like any other entity engaged in such a mission do all the following which is essential to the provision of hospital care—purchase or lease a building; hire and pay employees; and purchase equipment and supplies. In many States, the purchase or lease of a building will trigger the imposition of a property tax; the hiring and

payment of employees will trigger a payroll tax; and the purchase of equipment and supplies will trigger a sales tax. The payment of one or more of these state taxes by an ERISA plan that owns and operates a hospital will—*in just the same manner as the payment of an income or "gross receipts" tax on hospitals generally*—"deplete[ ] those assets earmarked for the provision of health care benefits" and thereby detrimentally affect the plan's ultimate "mission" by "caus[ing] the Fund to reduce benefits provided and/or to charge beneficiaries more in the future for benefits received." Pet. App. 12a.

In short, *any* state tax of general application that falls upon an ERISA plan that has chosen to engage in activity subject to the tax will leave the plan financially worse off than the plan would be in the absence of the tax. There is no rational basis for distinguishing between various forms of state taxes in this respect.[2]

Equally to the point, although the court below did not treat with *non*-tax, police power regulations of general application that will invariably fall upon ERISA plans when they choose to operate in an area—the provision of hospital care—that profoundly affects the health and welfare of the community, it cannot be gainsaid that such *non*-tax regulations have an impact on the "mission and purpose" of an ERISA plan hospital, Pet. App. 12a, of the same kind as the various State taxes of general application discussed above. Accordingly, just as there is no logical basis for distinguishing between New York's gross receipts tax on hospitals and other State taxes of general application in terms of their impact on the "mission and purpose" of ERISA plans that have chosen to own and operate hospitals within the State, there is no logical basis for at-

[2] As we have already shown *supra* pp. 10-18, perhaps the most glaring deficiency in the reasoning of the court below is that it cannot be squared with the holding and logic of *Travelers* nor with *Travelers* evident application to a gross receipts tax imposed on third-party hospitals from whom ERISA welfare plans purchase hospital services.

tempting to draw such a distinction between New York's gross recepits tax on hospitals and the various *non*-tax State police power regulations that are applicable to the provision of hospital services generally.

New York's hospital licensing law, for example, requires all hospitals to conform to State-approved systems of cost-analysis, reporting and audits, and to maintain "premises, equipment, personnel, rules and by-laws, standards of medical care, and hospital service" that are "fit and adequate" according to State law. *See* N.Y. Pub. Health Law § 2805(1) and (2)(b) (McKinney 1993).

By their terms, these hospital licensing regulations force certain operational choices on an ERISA plan that has chosen to own and operate a hospital for its beneficiaries, thereby, in the words of the court below, "directly . . . affect[ing] the very operations and functions that make the Fund what it is." Pet. App. 12a.

Moreover, to the extent that these State-regulation-compelled choices require the ERISA plan hospital to make greater expenditures than it would otherwise make if left to its own devices in an unregulated environment, those expenditures will, in the words of the court below, "deplete[ ] those assets earmarked for the provision of health care benefits and, as a result, will cause the Fund to reduce benefits provided and/or to charge beneficiaries more in the future for benefits received." *Id.* (Or, to use respondents' words, "sap the lifeblood" of the Fund).[8]

Nor is this all. The internal inconsistencies in the decision below become clearer yet as applied to ERISA plans that provide rather than purchase other types of welfare benefits and services, such as day care services. *See generally* 29 U.S.C. § 1002(1). The acquisition of any property, personnel and supplies that an ERISA plan might need to provide day care services to its beneficiaries would subject the plan to State taxes of general application such as property taxes, payroll taxes an sales taxes. And, day care is unquestionably the kind of activity affecting the health and well-being of the community that routinely is the subject of State police power regulation.

[8] The same analysis would apply to, for example, medical malpractice suits, which have a dual impact on all hospitals including those owned and operated by ERISA plans—from the standpoint of setting standards for the provision of medical services and from a pure cost standpoint.

The payment of these State taxes by ERISA plans engaged in the provision of day care services, and compliance by such ERISA plans with the run of State police power regulations applicable to the provision of day care services, would—for the reasons explained above in the context of hospital services—have a substantial impact on the "mission and purpose" of such ERISA plans in precisely the same manner as a generally-applicable income or gross receipts tax on day care services.

As an analytical matter, then, either *all* State taxes and regulations of the kind discussed above "relate to" ERISA plans within the meaning of ERISA § 514(a), or *none* of them do. It is no "wolf cry," *supra* p. 16, to point out that the rationale of the court below for finding New York's gross receipts tax on hospitals to be preempted by ERISA would, if accepted, sweep away State police power taxation and regulation of activities traditionally taxed and regulated by the States to the extent that ERISA plans have chosen to engage in those activities. That is why that rationale is directly contrary to *Travelers'* rationale.

(2) Here and in the court below, respondents have sought to distinguish the instant case from *Travelers* on the independent ground that in *Travelers* the economic impact on ERISA plans of the surcharges imposed by New York on commercial insurers and HMOs was merely "indirect," whereas here the economic impact of New York's gross receipts tax on ERISA plans that have chosen to own and operate hospitals is "direct."

As our discussion of *Travelers* and *Mackey* in Part I foreshadows, this distinction between "indirect" and "direct" economic effects on ERISA plans can no more carry the day for respondents than the distinction that the court below attempted to draw between State taxes of general application that do affect and do not affect the "mission and purpose" of ERISA plans. We add only a few words here.

To begin, the fact that New York's gross receipts tax on hospitals imposes a "direct" cost on ERISA plans that have chosen to own and operate hospitals—while offered by respondents as a basis for distinguishing the instant case from the *Travelers'* situation—is not offered, and cannot possibly serve, as a basis for distinguishing the instant case from the facts of the *Mackey* situation or from *Travelers'* elaboration of *Mackey*.

General state garnishment statutes of the kind considered in *Mackey* plainly impose *direct* costs on ERISA plans that are served with garnishment orders. *See Mackey*, 486 U.S. at 831. The same "obviously" is true with respect to "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan." *Id.* at 833. The *Mackey* Court did *not* deem this kind of "direct" imposition of costs on ERISA plans to be a basis for holding the general State garnishment statute preempted by ERISA § 514(a); nor did the Court view this "direct" imposition of costs on ERISA plans as an obstacle to accepting the concession of the *Mackey* petitioners and the United States that ERISA § 514(a) does not immunize ERISA plans against a wide range of state law claims that might be brought against them—and, of necessity, does not immunize such plans from the force of such state laws and the costs of complying with those laws.

Indeed, it was on the basis of *Mackey* that the court below itself was forced to acknowledge that not all State taxes of general application that impose direct costs on

hospitals owned and operated by an ERISA plan are on that account preempted by ERISA § 514(a). *See* Pet. App. 11a-12a.

Nor does the theory that New York's gross receipts tax on hospitals falls "directly" rather than "indirectly" on ERISA plans that have chosen to own and operate their own hospitals supply a principled basis for distinguishing the instant case from *Travelers*.

The *Travelers* Court, after all, upheld New York's surcharges on commercial insurers and HMOs against an ERISA preemption challenge on the Court's express understanding that those surcharges would be passed on to those persons and entities, *including ERISA plans*, that chose to purchase commercial insurance or HMO membership. *See* 115 S.Ct. at 1678-79 ("Since the surcharges are presumably passed on at least in part to those who purchase commercial insurance or HMC membership, their effects follow from their purpose."). On that understanding ERISA plans would (along with others) bear the ultimate economic burden of the surcharges just as surely as the plans would bear the burden of a tax payable by a plan owned hospital.

That being so, the logic of *Travelers* indicates that the decision uses the terms "indirect" and "direct" in a different sense than respondents use those terms.[4] The *Travelers* Court's rationale for finding *no* ERISA preemption was that while the New York surcharge law obviously and substantially affected the relative cost and attractiveness of various insurance packages that ERISA plans might

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[4] It is worthy of note that *Alessi*, *Shaw* and *FMC Corp.* use the terms "direct" and "indirect" in yet a different sense—to characterize laws that are addressed to benefit issues in terms and laws that are addressed to a broader subject, such as workers compensation, and that have application to benefit issues. As *Alessi* makes clear, in that context the Court has refused to find any distinction of substance for ERISA § 514(a) purposes in the direct/indirect dichotomy.

purchase, the law did not run afoul of the "basic thrust of the [ERISA] pre-emption clause" by "*mandat*[*ing*]" the plan's "employee benefit structures and their administration." 115 S.Ct. at 1677-78 (emphasis added).

This rationale applies equally to State-mandated costs that fall equally on ERISA plans that provide hospital care through a plan owned and operated hospital and on third person providers of hospital care services. In both the State law has only an *indirect* effect on the plans' "employee benefit structures and their administration." And, under *Travelers*, such an effect does *not* trigger ERISA preemption.

CONCLUSION

For the foregoing reasons, the decision and judgment of the United States Court of Appeals for the Second Circuit in this case should be reversed.

Respectfully submitted,

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